Supreme Court, U.S.
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No. 05- 05-817

IN THE

Supreme Court of the United States

GLEN GUADALUPE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below – contrary to the position of at least one other circuit court, as well as this Court's recent suggestion – erroneously determined that the federal nexus/interest requirement of witness tampering under 18 U.S.C. § 1512(b)(3) requires no proof that petitioner knew or believed that the person he attempted to tamper with might communicate with federal authorities?

2. Whether in light of this Court's decision in *Arthur Andersen v. United States*, the court below applied erroneous standards while analyzing petitioner's complaints about the district court's jury instructions?

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Petitioner, Glen Guadalupe, respectfully requests a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit which was entered in this case on March 31, 2005 with rehearing being denied on July 19, 2005.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at *United States v. Guadalupe*, 402 F.3d 409 (3d Cir. 2005) and is found in the Appendix (App. A). The judgment of the United States Court of Appeals for the Third Circuit entered on March 31, 2005 is found in the Appendix. (App. B). The Judgment of the United States District Court for the Eastern District of Pennsylvania in *United States v. Guadalupe*, Criminal No. 01-429(1) was entered on August 8, 2003 and can be found in the Appendix. (App. C). The Order of the United States Court of Appeals for the Third Circuit denying rehearing dated July 19, 2005 is found in the Appendix. (App. D).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On November 28, 2005, Justice Souter granted an extension of time to and including December 16, 2005 to file this petition.

This case was originally commenced by indictment in the United States District Court for the Eastern District of Pennsylvania. On May 9, 2002, after a jury trial, Petitioner was convicted of one count of obstruction of justice/witness tampering in violation of 18 U.S.C. § 1512(b)(3). On or about August 8, 2003, the district court sentenced Petitioner to 15 months imprisonment. Petitioner sought review of his conviction

and sentence before the United States Court of Appeals for the Third Circuit. By Opinion and Judgment dated March 31, 2005, the Court of Appeals affirmed Petitioner's conviction. (App. A and B). It is from that judgment (App. B) that Petitioner requested a writ of certiorari be issued.

STATUTORY PROVISIONS INVOLVED

In relevant part, the United States Code in effect at all times relevant to this case provided:[1]

> Whoever, knowingly . . . corruptly persuades another person, or attempts to do so with intent to . . . hinder, delay or prevent the communication to a law enforcement office, or judge of the United States of information relating to the commission or possible commission of a federal offense, [shall be guilty of a crime against the United States].

18 U.S.C. § 1512(b)(3).

For purposes of this section — . . .

> An official proceeding need not be pending or about to be instituted at the time of the offense.

18 U.S.C. § 1512(e)(1).[2]

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1. The relevant statutory provisions at issue in this case, specifically, 18 U.S.C. § 1512 was amended in a way not relevant to this case after the events in question and petitioner's trial. All statutory citations will be to code sections as they were codified during the relevant time period.

2. This provision is currently codified at 18 U.S.C. § 1512(f)(1).

In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstances —

(1) That the official proceeding before a judge, court or magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States Magistrate Judge, a Bankruptcy Judge, a Federal Grand Jury, or a federal government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the federal government or a person authorized to act for or on behalf of the federal government or serving the federal government as an advisory or consultant.

18 U.S.C. §§ 1512(f)(1) & (2).[3]

STATEMENT OF THE CASE

A. Proceedings and Disposition in the Courts Below

On or about July 26, 2001, a grand jury sitting in the Eastern District of Pennsylvania returned an indictment in this matter charging petitioner with two counts (Counts 3 and 4) of obstruction of justice in violation of 18 U.S.C. § 1512(b)(3). At the time of the offenses alleged, petitioner was employed as the Deputy Warden of the Curran Fromhold Correctional Facility ("CFCF"), a prison within the Philadelphia County Prison System.

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3. These sections are currently codified at 18 U.S.C. §§ 1512(g)(1) and (2).

The charges stem from petitioner's alleged efforts to hinder an internal prison investigation into an incident alleged to have occurred on March 11, 1999 during which correctional officers at CFCF severely beat Donti Hunter ("Hunter"), an inmate at CFCF. The grand jury concluded that correctional officers violated Hunter's 8th Amendment right to be free from cruel and unusual punishment.[4]

As to petitioner, the indictment alleged that with respect to two different individuals in a position to provide information about the March 11, 1999 incident, petitioner encouraged these people to provide less than truthful information to internal prison investigators.

On or about April 16, 2002, petitioner proceeded to trial on the charges laid in the indictment. After an approximate two week trial, on or about May 1, 2002, the jury found petitioner guilty of Count 3, but not guilty of Count 4.

On or about August 27, 2003, the district court, after granting a series of downward departures, imposed a sentence of 15 months imprisonment, special assessment of $100 and a $300 fine.

Thereafter, petitioner sought review of his conviction only[5] before the United States Court of Appeals for the Third

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4. The grand jury did charge several correctional officers with conspiracy to deprive Donti Hunter of his civil rights in violation of 18 U.S.C. § 241 and the substantive deprivation of Donti Hunter's civil rights in violation of 18 U.S.C. § 242. These charges were laid in Counts 1 and 2 of the indictment.

5. Petitioner did not challenge his sentence. In fact, petitioner did not even request bail pending appeal. Instead, petitioner served his prison sentence and is now on supervised release.

Circuit. On about March 31, 2005, the Third Circuit Court of Appeals issued its Judgment and Opinion, affirming petitioner's conviction. The Third Circuit's Opinion and Judgment are attached hereto (App. A and B).

Petitioner timely filed a petition for rehearing with the Third Circuit Court of Appeals. On November 28, 2005, the court below denied petitioner's request for rehearing (App. D).

Petitioner timely filed with this Court an application under Supreme Court Rule 13(5) requesting an extension of time in which to petition this Court for a writ of *certiorari*. This Court extended the deadline by which petitioner must file his petition for writ of certiorari to Friday, December 16, 2005.

B. Statement of the Facts

On March 11, 1999, petitioner was employed as the Deputy Warden at the Curran Fromhold Correctional Facility ("CFCF"), a prison in the Philadelphia County Prison System. On that date, there was an altercation between several correctional officers and Donti Hunter, an inmate at CFCF. During this altercation, the inmate sustained injuries and several correctional officers were charged with civil rights violations.

Petitioner was not involved in any respect in the altercation between correctional officers and Hunter. Petitioner, as Deputy Warden, did have some supervisory responsibility over the prison's internal investigation into the correctional officers' use of force. While supervising the prison's internal investigation, petitioner was alleged to have

engaged in obstructionist conduct violative of 18 U.S.C. § 1512(b)(3) stemming from his alleged efforts to hinder the prison's internal investigation. Count 3 of the indictment charged petitioner with obstructive efforts directed towards then Correctional Lieutenant Linda Burnette, while Count 4 of the indictment alleged obstructive conduct directed towards Correctional Captain Winston Boston. The jury found petitioner guilty with respect to his conduct directed towards Burnette, (Count 3) but found him not guilty with respect to his conduct towards Boston (Count 4).

As to the count of conviction, the evidence can be fairly summarized as follows:

After learning of the incident and making some preliminary observation, then- Correctional Lieutenant Linda Burnette, the alleged victim in Count 3, contacted Captain Winston Boston to inform him of the facts and circumstances surrounding the incident. Thereafter, Burnette went to the medical unit to check on the inmate. When she arrived at the medical unit, Captain Boston was already there.

Burnette informed Captain Boston of her observations and specifically that she had ordered the correctional officers to stop beating Hunter. Burnette testified further that Captain Boston instructed Burnette to begin gathering the paperwork necessary to complete prison forms concerning the "use of force" report. Burnette believed the use of force reports would ultimately make their way to petitioner, as the Deputy Warden of the institution.

After speaking with Captain Boston, Burnette returned to the unit where the incident occurred and thereafter went to see petitioner. Upon arriving at petitioner's office, Burnette

claims to have explained the incident to petitioner. She told petitioner that the inmate said someone had beaten him with handcuffs. According to Burnette, petitioner said that somebody was going to "burn" for what happened. Burnette claims that petitioner specifically told her that "if [she] didn't burn the officers, [she] and the sergeant were going to burn." According to Burnette, petitioner then inquired about the identity of the officers involved. After Burnette identified the officers, Burnette claims that petitioner said "they can't burn, they're my boys, my homies."[6]

Burnette testified that she then left petitioner's office. Later that day, while conducting some other prison business, Burnette ran into Captain Boston and petitioner. According to Burnette, petitioner then began discussing the incident and suggested that one of the correctional officers needed to fabricate an injury to justify the level of force used on Hunter. Burnette further claims that petitioner directed her to omit from the internal prison memorandum which she was in the process of preparing her claim that she ordered the officers to stop beating Hunter.

Burnette testified that she was intimidated by petitioner's direction that she be less than truthful in preparing reports. Because of this, she was also less than candid in an internal affairs interview concerning the incident. All of the above events took place on March 11, 1999, the day of the incident.

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6. At trial, petitioner testified in his own defense and denied that he sought to protect any particular correctional officer. In addition, he denied any effort to persuade Burnette to falsely report the underlying incident. However, as the verdict winner, the government is entitled to all favorable factual inferences. Therefore in stating facts, petitioner will be cognizant of his role as verdict loser.

Burnette then testified that sometime around March 21, 1999, she contacted a friend, Lieutenant Collier, and confided in him that she was troubled by her failure to tell the truth about the underlying incident. According to Burnette, Collier suggested she speak directly to the prison's Warden, Walter Dunleavy. Burnette could not, however, reach Warden Dunleavy immediately.

At trial, Warden Dunleavy testified as a government witness. Warden Dunleavy provided information concerning the reporting policies and procedures regarding incidents where force is used on an inmate. In addition, Dunleavy testified that he directed petitioner to have an investigation report done by the captain and to have photographs taken of the inmate who was beaten. Warden Dunleavy also explained that it is prison policy to conduct investigations and issue a report when force is used against any inmate.

The government also presented the testimony of Captain Winston Boston,[7] who testified that after learning of the incident, he made some preliminary observations and spoke directly with the inmate. He then had some conversation with Burnette, who told him, "[the correctional officers] wouldn't listen to me." Boston then claims to have directed the commencement of some preliminary investigative efforts but thereafter spoke with petitioner. During Boston's conversation with petitioner, according to Boston, petitioner told him not to take any pictures of the situation. Boston also testified that during a meeting between he, petitioner and Burnette, that petitioner encouraged Burnette to exclude from her memorandum of the incident her claim that the

7. Boston was the alleged victim of Count 4 of which petitioner was acquitted. Boston did, however, provide some testimony concerning petitioner's conduct *vis a vis* Burnette.

officers would not listen to her. In addition, Boston claimed that petitioner told Burnette to say that she was at the console and did not see anything during the incident.

In addition to testifying on his own behalf, petitioner presented a number of fact witnesses to establish that he acted appropriately in supervising the prison's investigation into the incident involving Donti Hunter. Specifically, Captain Mary Padilla testified that petitioner put her in charge of the reporting and referral to, and investigation by, the Internal Affairs Division and that petitioner did not impede her efforts. In addition, petitioner presented several other prison employees to corroborate his claim that he did not act inappropriately with regard to the investigation into the incident.

Interestingly, at trial, no testimony, document or other form of evidence was received by the district court from which one could reasonably infer that petitioner had any inkling, no matter how remote, that the investigation which petitioner was alleged to have interfered with had any federal nexus whatsoever. There was no mention of any federal law enforcement officials being involved until long after March 11, 1999, the day on which petition allegedly corrupted justice.

REASONS FOR GRANTING THE PETITION

A. The court below — contrary to the position of at least one other circuit court of appeals, as well as this Court's recent suggestion — erroneously determined that the federal nexus/interest requirement of witness tampering under 18 U.S.C. § 1512(b)(3) requires no proof that petitioner knew or believed that the person he attempted to tamper with might communicate with federal authorities.

The statute of concern herein provides:

> Whoever, knowingly, corruptly persuades another person, or attempts to do so with intent to prevent the communication to a law enforcement officer, or judge of the United States of information relating to the commission or possible commission of a federal offense, shall be guilty of a crime against the United States.

18 U.S.C. § 1512(b)(3). Conviction under this statute requires proof of the following four elements:

(1) Petitioner acted knowingly;

(2) Petitioner attempted to corruptly persuade another person;

(3) Petitioner acted with the intent to prevent communication to a law enforcement officer or judge of the United States of information relating to the commission of a federal offense; and

(4) Such information related to a federal crime.

United States v. Causey, 185 F.3d 407 (5th Cir. 1999); *United States v. Veal*, 153 F.3d 1233, 1252 (11th Cir. 1998).

In assessing the sufficiency of the evidence concerning the federal nexus required under this statute, the court below applied an erroneous standard, which essentially allows conviction for interfering with any investigation into a crime if that crime is potentially federal.

In an earlier decision, the court below articulated the burden of proof on what might be referred to as the "federal nexus" element of 18 U.S.C. § 1512 as follows:

> [The government must] prove that at least one of the law enforcement-officer communications which the defendant sought to prevent would have been with a federal officer, but the government is not obligated to prove the defendant knew or intended anything with respect to this federal involvement. . . .

United States v. Bell, 113 F.3d 1345, 1349 (3d Cir. 1997) (citations omitted).

Admittedly, under Third Circuit jurisprudence, the government need not prove that petitioner specifically intended to interfere with a federal investigation, but 18 U.S.C. § 1512(b)((3) does require the government to establish that appellant "had the intent to influence an investigation *that happened to be federal*." *United States v. Applewhaite*, 195 F.3d 679, 687 (3d Cir. 1999).

In affirming petitioner's conviction, the court below held that a conviction for obstruction of justice/witness tampering under 18 U.S.C. § 1512(b)(3) requires *no proof* that petitioner believed that the person he attempted to corruptly persuade might communicate with federal authorities. In fact, the court specifically found that the government "did not prove that [petitioner] had actual knowledge of the federal nature of the offense or that Burnette's information might ultimately be communicated to officers who happened to be federal." *United States v. Guadalupe*, 402 F.3d 409, 414 (3d Cir. 2005). The court simply concluded that such knowledge could be inferred from petitioner's tenure within the Philadelphia Prison System. *Id.*

The analytical model employed by the court below is flawed for two reasons. First, the court's decision is in direct conflict with its earlier decisions discussing this very subject.[8] More importantly, however, the Third Circuit's approach to this issue differs significantly from that employed by the Fifth Circuit Court of Appeals in *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999) and from the approach recently suggested by this Court in *Arthur Andersen v. United States*, __ U.S. __, 125 S. Ct. 2129 (2005). The issue of concern, the level of proof required to satisfy the federal nexus element of 18 U.S.C. § 1512(b)(3), is of extreme importance, especially

8. The court below has been most prolific in its writings concerning the federal interest element of 18 U.S.C. § 1512. Including the reported decision in this case, the court below has issued at least four other precedential opinions addressing this subject. *See United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996); *United States v. Bell*, 113 F.3d 1345 (3d Cir. 1997); *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999); *United States v. Stansfield*, 171 F.3d 806 (3d Cir. 1999).

given the direct conflict between the Third Circuit's approach and that of the Fifth Circuit Court of Appeals.[9]

To understand the differences underlying the split among the circuit courts, it is necessary to first understand the approach employed by the court below. As stated previously, the court below has addressed the issue to some extent on several occasions. *See United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996) (*Stansfield I*); *United States v. Bell*, 113 F.3d 1345 (3d Cir. 1997); *United States v. Stansfield*, 171 F.3d 806 (3d Cir. 1999) (*Stansfield II*); and *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999). In each of these cases, *Stansfield*, *Bell* and *Applewhaite*, the alleged obstructive conduct was directed at, or people directly in contact with, law enforcement officers who were in fact conducting criminal investigations in which the defendant was ultimately charged. Within the confines of analyzing the sufficiency of evidence in each of those cases, the court below held that what is commonly referred to as the federal interest/nexus element of 18 U.S.C. § 1512 does not require a defendant's in fact knowledge of the federal nature of the criminal investigation. *United States v. Stansfield*, 171 F.3d 806, 816 (3d Cir. 1999). Instead, the court below has held that the federal interest/nexus element of 18 U.S.C. § 1512 can be satisfied simply by interfering with a criminal investigation in which federal authorities are in fact participating, *see*, *United States v. Bell*, 113 F.3d at 1349, or interfering with the *actual criminal* investigation of a crime

9. In fact, the opinion issued by the court below has been cited by at least two other courts of appeals in support of convictions under 18 U.S.C. § 1512(b) in cases where there was a dearth of evidence concerning the required federal interest/nexus element. *See United States v. Bailey*, 405 F.3d 102, 108 (1st Cir. May 3, 2005); *United States v. Serrata*, 425 F.3d 886, 897 (10th Cir. Oct. 6, 2005).

that happens to be federal. *See, e.g., United States v. Applewhaite*, 195 F.3d at 687.

In this case, however, the court below unreasonably extended its prior rulings in *Stansfield*, *Bell* and *Applewhaite* to a new level. Specifically, in this case, the court below required no proof of the in fact existence of a criminal investigation or a belief that petitioner hindered someone from potentially communicating with federal officials. The court below justified extending its prior holdings simply on the defendant's status as a long term prison employee. Specifically, the court held:

> Here, the government met its burden of proof as most recently articulated in *Applewhaite* because [petitioner] intended to influence an investigation which later became federal. We also stay faithful to the teachings of *Stansfield* and *Bell* because there is 'additional appropriate evidence' that [appellant] knew or should have known that Burnette might communicate with federal officials based on his position and experience as a prison administrator.

United States v. Guadalupe, 402 F.3d 409, 414-415 (3d Cir. 2005). Petitioner's case differs significantly from prior precedents of court below because the investigation with which petitioner interfered was not a "criminal" investigation, nor were any federal law enforcement officials in fact involved. By extending its prior holdings, the court below essentially nullified the indisputably required element of § 1512(b) that a culpable defendant believe that the person he/she attempts to corruptly persuade might communicate

with federal authorities. *See United States v. Stansfield*, 101 F.3d 909, 918 (3d Cir. 1996). In this instance, petitioner's conduct was clearly limited to interfering with an internal prison investigation.[10]

The court justified its extension of its prior holdings by suggesting that the required federal interest/nexus can be inferred simply from the fact that the underlying offense being investigated was federal in nature, provided there is "additional appropriate evidence." *United States v. Guadalupe*, 402 F.3d at 413-414. In this instance, the court below found the "additional appropriate evidence" to be nothing more than petitioner's status as a long time prison employee.[11] This, combined with the federal nature of the offense, which at the time of the obstructive behavior was not even the subject of a criminal investigation, was deemed sufficient.

Not only is the analysis employed by the court below an illogical extension of its prior holdings, it directly conflicts with the approach employed by the Fifth Circuit Court of Appeals. In *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999), a case strikingly similar in relevant fact to petitioner's case, the court reversed the conviction of a police officer

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10. The absurdity of the Third Circuit's holding is best demonstrated by example. Because it is a federal crime for a felon to possess a firearm, *see* 18 U.S.C. § 922(g), if such a felon is in possession of a firearm and encourages someone to lie to a local police officer about the felon's possession of the firearm, such encouragement would violate 18 U.S.C. § 1512(b)(3).

11. This "additional appropriate evidence standard" is a standard created by the court below in order to justify its earlier decisions. *See United States v. Stansfield*, 104 F.3d 909 (3d Cir. 1991).

under 18 U.S.C. § 1512(a)(1)(c) because there was no evidence to suggest that the hindering conduct was intended to thwart any investigation other than a police department internal investigation. *United States v. Causey*, 185 F.3d at 422-423. In reversing the conviction, the Fifth Circuit considered a number of decisions interpreting 18 U.S.C. § 1512(b). After analyzing the earlier decisions of the court below, as well as the Eleventh Circuit's opinion in *United States v. Veal*, 153 F.3d 1233 (11th Cir. 1988), the Court in *Causey* applied a much different standard than that applied by the court below and reversed the conviction. In justifying reversal, the court stated:

> The evidence reveals that [defendant's] specific intent was to short circuit the IAD investigation and to send the IAD a message to leave him alone in his misuse of police power. There is not evidence that the likelihood or possibility that the murder might impact a future federal investigation played a part in this crime. The evidence was sufficient to establish that Groves' police brutality complaint concerned a federal crime and that the defendants intended to interfere with Groves pursuant of that complaint, however, prior to her death, the only agency to which Groves had complained was the New Orleans police department. There is nothing in this record which would support a jury finding that any of the persons to whom Groves complained were federal officers. Likewise, there is nothing in this record which would support a jury finding that Groves had any intention of communicating with any federal law enforcement officer prior to her death. Finally, there is no evidence in this record that

> would support an inference that [defendant] intended to prevent Groves from pursuing her complaint beyond the New Orleans police department IAD and communicating with authorities who were in fact federal officers.

United States v. Causey, 185 F.3d at 422-23.

Obviously, the Fifth Circuit Court of Appeals requires some evidence suggesting that a defendant has some knowledge that the investigation being conducted is of a federal nature to some degree or another. Clearly, the court below and several other circuit courts require no such knowledge. *See United States v. Bailey*, 405 F.3d 102, 108 (1st Cir. 2005); *United States v. Veal*, 153 F.3d 1233 (11th cir. 1998); *United States v. Perry*, 335 F.3d 316 (4th Cir. 2003). Petitioner is not alone in noting a split among the circuits on this very subject. In fact, quite recently, the Tenth Circuit Court of Appeals recognized and discussed the split among the circuits on this very issue. *See United States v. Serrata*, 425 F.3d 886, 896-897 (10th Cir. Oct. 6, 2005).

Not only does the view of the court below differ from that of the Fifth Circuit, it also differs from that recently suggested by this Court in *Arthur Andersen v. United States*, __ U.S. __, 125 S. Ct. 2129 (May 31, 2005). In *Arthur Andersen*, this Court reversed the conviction of an accounting firm under 18 U.S.C. §§ 1512(b)(2)(A) & (B) following the firm's intentional destruction of records during the early stages of the Securities & Exchange Commission's investigation into the now infamous Enron debacle. Admittedly, ~~the~~ narrow holding in *Arthur Andersen* relates more directly to the appropriateness of jury instructions

concerning the corrupt persuasion element of § 1512(b).[12] *Id.* at 2135-2136. However, in addition to addressing the infirmity of the jury instructions with respect to the words "corruptly persuade," this Court also criticized the jury instructions because "[t]hey led the jury to believe that it did not have to find *any* nexus between the 'persua [sion]' to destroy documents and any particular proceeding." *Id.* at 2136. In *Arthur Andersen*, the nexus of concern was that between the corrupt persuasive conduct — destruction of documents — and the existence of an official proceeding. In commenting on the jury instructions in this regard, this Court stated that a "knowingly . . . corrup[t] persuade[r] cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceedings in which those documents might be material." *Id.* at 2137.

Admittedly, in petitioner's case, the nexus of concern is that between the corrupt persuasive conduct — encouraging Burnette to lie to prison officials — and the federal nature of the investigation. It seems to follow, however, that if, as stated in *Arthur Andersen*, this Court requires there to be some knowledge by the corrupt persuader that his conduct would have some impact on an official proceeding, the statute should also be read to require that the corrupt persuader have some knowledge that the investigation is of a federal nature.[13]

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12. This issue is discussed in more detail below.

13. Interestingly, in addressing the nexus between the defendant's state of mind and the existence of a proceeding, this Court rejected a government argument which is remarkably similar to the position taken by the Court below, specifically, that 18 U.S.C. § 1512(e)(1) vitiates any nexus that might be required between the

(Cont'd)

In light of the clear conflict between the Third Circuit and the Fifth Circuit Court of Appeals, as well as the logical inferences to be drawn from this Court's opinion in *Arthur Andersen v. United States*, *supra*, this Court should grant petitioner's writ of certiorari. *See* Supreme Court Rule 10(a).

B. In light of this Court's decision in *Arthur Andersen v. United States*, the court below applied erroneous standards while analyzing petitioner's complaints about the district court's jury instructions.

Below, petitioner unsuccessfully argued two deficiencies in the district court's jury instructions. First, he claimed error in the district court's failure to provide any definition of the words "corruptly persuade" in 18 U.S.C. § 1512(b)(3). In addition, petitioner asserted that the district court failed to properly instruct the jury regarding petitioner's state of mind concerning the federal nexus required under the statute. *See United States v. Guadalupe*, 402 F.3d at 415-18.

While instructing the jury, the district court properly stated the four statutorily required elements of 18 U.S.C. § 1512(b)(3). However, in further commenting on these elements, the district court never explained or defined the meaning of the words "corruptly persuades." Interestingly, the district court's failure to provide any definitional assistance on this point is in direct conflict with earlier

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(Cont'd)

corrupt persuasive activity and the object of that activity, which in *Arthur Andersen* was an official proceeding and in this instance was the hindering of an investigation of a federal nature. *Compare Arthur Andersen v. United States*, 125 S. Ct. at 2136-37 with *United States v. Guadalupe*, 402 F.3d at 411-12.

precedent of the court below. *See United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997). Nonetheless, the court below found the deficiency of the district court to be uneventful. Specifically, the court stated:

> First, even if the [district court] erred by not defining 'corruptly persuades,' there is no evidence that this error had a prejudicial effect on the jury's deliberations so as to produce a miscarriage of justice. Unlike Farrell, [petitioner] does not contend that there is insufficient evidence that his conduct constituted corrupt persuasion within the meaning of the statute. The evidence is sufficient that [petitioner] instructed Burnette to lie to cover up the incident. Accordingly, there was no miscarriage of justice.

United States v. Gaudalupe, 402 F.3d at 415.

As stated above, petitioner sought reconsideration of the court below's March 31, 2005 judgment and opinion. While the matter was pending for reconsideration, this Court issued its opinion in *Arthur Andersen v. United States*, *supra*, in which this Court reversed the conviction of an accounting firm under 18 U.S.C. §§ 1512(b)(2)(A) and (B) because the district court failed to properly instruct the jury on the meaning of the "corrupt persuasion." In *Arthur Andersen*, this Court addressed some of the very issues raised by petitioner concerning the inadequacy of the jury's instructions at issue in this case. Therefore, the writ of certiorari should issue.

In *Arthur Andersen*, an accounting firm was prosecuted for its role in destroying records. As stated above, in that case, this Court addressed the efficacy of jury instructions related to 18 U.S.C. §§ 1512(b)(2)(A) & (B), which provides in relevant part as follows:

> Whoever knowingly . . . corruptly persuades another, or attempts to do so, or engages in misleading conduct toward another person, with the intent to . . . cause or induce any person to [destroy documents] with intent to impair the [document's] integrity or availability for use in an official proceeding [commits a crime].

18 U.S.C. §§ 1512(b)(2)(A) and (B).

At trial, the district court based its jury instructions on a modified version of a Fifth Circuit Pattern Jury Instruction for 18 U.S.C. § 1503. At the government's suggestion, the district court instructed the jury that to satisfy the element of knowingly corrupt persuasion, the jury need only find that the defendant intended to "subvert, undermine or impede" governmental fact-finding by suggesting to its employees that they enforce the document retention policy. *Arthur Andersen v. United States*, 125 S. Ct. at 2137. In light of these instructions, which, as this Court noted, were striking in how little culpability they required (*see Arthur Andersen v. United States*, *id.* at 2136), the firm was found guilty. The Fifth Circuit Court of Appeals affirmed the conviction. Arthur Andersen then sought and obtained review before this Court.

In reversing the accounting firm's conviction, this Court noted its traditional restraint:

> in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress . . . and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'

Andersen v. United States, *id.* at 2134 (citations omitted). The Court then noted that:

> Such restrain is particularly appropriate here, where the act underlying the conviction — 'persua[sion]' — is by itself innocuous.

Andersen v. United States, *id.*

In specifically addressing the corrupt persuasion element of 18 U.S.C. § 1512(b), the Court held that the term "knowingly" modifies the words "corruptly persuades." Consequently, in the words of this Court:

> [o]nly persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].' And limiting criminality to persuaders conscience of their wrongdoing sensibly allows § 1512 (b) to reach only those with a level of 'culpability . . . we usually require in order to impose criminal liability.

Andersen v. United States, *id.* at 2135 (citations omitted).

Additionally, this Court also noted that the jury was not specifically instructed that "knowingly" modifies the terms "corruptly persuade" and that the words "corruptly persuade" were not properly defined, [which] led the jury to "[believe] that it did not have to find *any* nexus between the 'persua[sion]' to destroy documents and any particular proceeding." *Andersen v. United States*, *id.* at 2136.

Finally, this Court rejected the government's invitation to broadly read 18 U.S.C. § 1512(e)(1) which provides that an official proceeding "need not be pending or about to be instituted at the time of the offense." The government suggested there need not be any nexus between Arthur Andersen's ostensible knowing corrupt persuasion and a specific proceeding. In rejecting the government's reliance on 18 U.S.C. § 1512(e)(1), this Court stated:

> It is, however, one thing to say that a proceeding 'need not be pending or about to be instituted at the time of the offense,' and quite another to say that a proceeding not even be foreseen. A 'knowingly . . . corrup[t] persuade[r],' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

Andersen v. United States, *id.* at 2137.

In light of the above, it follows that in a prosecution under any subsection of 18 U.S.C. § 1512(b), which has as an element corrupt persuasion, the jury must be instructed that: (1) corrupt persuasion requires that a defendant acted

intentionally, and with a malign purpose, knowingly and dishonestly with the specific intent to subvert or undermine the integrity of a specific proceeding (or federal investigation, if the charges involve 18 U.S.C. §§ 1512(b)(3)); and (2) the corrupt persuading activity must be specifically directed to a proceeding if prosecuted under 18 U.S.C. § 1512(b)(2), or a federal investigation if prosecuted under 18 U.S.C. § 1512(b)(3).

Below, petitioner pressed for a new trial because the district court failed to provide any definition of the words "corruptly persuade" – which the court below had previously labeled "inherently ambiguous." *United States v. Farrell*, 126 F.3d 484, 487 (3d Cir. 1979). In light of *Arthur Andersen*, it is now clear that petitioner's claim of error flowing from the district court's failure to at all define the words "corruptly persuade," is truly significant and supports issuance of the requested writ.

Ironically, in *Arthur Andersen*, this Court reversed a conviction where the district court at least attempted to provide some definitional assistance, although erroneous, for the term "corruptly persuade." In petitioner's case, the district court failed to define "corrupt persuasion" at all. Nowhere in its instruction to the jury, after it recited the applicable statutory language, did the district court ever mention the words "corruptly persuade." If it was error in *Arthur Andersen* for the district court to improperly define the terms "corrupt persuasion," then clearly, the absence of any instruction concerning the corrupt persuasion element must be error.

In *Arthur Andersen*, this Court also confirmed that proof of a defendant's motive and specific intent regarding the object of his allegedly obstructive conduct are essential to

conviction. Hence, it is clear that juries must be instructed to consider a defendant's specific intent and motive. As this Court stated, the terms "corrupt" and "corruptly" are "normally associated with wrongful, immoral, depraved, or evil" action. *Andersen v. United States*, *id.* at 2135.

Additionally, this Court's decision in *Arthur Andersen* supports petitioner's argument that the district court should have more forcefully instructed the jury to focus concerning the nexus between appellant's obstructive conduct and his state of mind concerning the federal nexus element. Admittedly, this Court's decision in *Arthur Andersen* does not specifically address the level of proof and associated jury instructions required concerning the federal nature of the investigation under 18 U.S.C. § 1512(b)(3). However, in an analogous argument, *i.e.*, the relationship between a defendant's intent, his obstructive conduct and existence of a proceeding under § 1512(b)(3), this Court stated that the defendant must have in mind a specific proceeding when he/it engages in the alleged corrupt persuasive conduct. As stated previously, on this point, this Court specifically rejected the government's suggestion of an expansive interpretation of 18 U.S.C. § 1512(e)(1).

In light of this Court's hesitance to expansively read 18 U.S.C. § 1512(e)(1), it follows that Court also rejects the court below's expansive interpretation and application of 18 U.S.C. § 1512(f)(1) through which the court inferred that petitioner really need not be thinking at all about a federal investigation, only that he intend to interfere with a non-criminal investigation that happens to involve the subject matter that happens to constitute a federal crime. Such an expansive reading of 18 U.S.C. § 1512(f)(1) is inconsistent with what this Court has noted as "restraint in assessing the reach of a federal criminal statute." *Andersen v. United States*, *id.* at 2134.

If the jury instructions in *Arthur Andersen* were infirm because the "jury was led to believe that it did not have to find some nexus between Arthur Andersen's 'persuasion' and any particular proceeding," it follows that in petitioner's case, the jury instructions were infirm because the jury was not instructed that it had to find some nexus between petitioner's corrupt persuasive conduct and a specific investigation that happens to be federal in nature.

CONCLUSION

For all of the above reasons, petitioner requests that this Court issue a writ of certiorari in this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 31, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-3358

UNITED STATES OF AMERICA

v.

GLENN GUADALUPE

Appellant.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 01-cr-00429-1)
District Judge: The Honorable William H. Yohn, Jr.

Argued February 15, 2005

Before: SLOVITER, AMBRO and ALDISERT, *Circuit Judges*

(Filed: March 31, 2005)

Appendix A

OPINION OF THE COURT

ALDISERT, Circuit Judge.

This appeal by Glen Guadalupe requires us to decide whether: (1) the jury's verdict is supported by legally sufficient evidence; and (2) the district court properly instructed the jury. Guadalupe was tried jointly with Appellants Reginald Steptoe and Cornell Tyler in the United States District Court for the Eastern District of Pennsylvania. The jury found Steptoe and Tyler guilty of deprivation of the civil rights of another in violation of 18 U.S.C. § 242 and Guadalupe guilty of obstruction of justice in violation of 18 U.S.C. § 1512(b)(3). Guadalupe was sentenced to, *inter alia,* incarceration for a term of fifteen months. This appeal followed.[1]

The insufficiency of evidence contention is anchored on the theory that the government failed to prove that Guadalupe

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1. The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and we have jurisdiction pursuant to 28 U.S.C. § 1291. Because Guadalupe did not challenge the sufficiency of the evidence or the jury instructions at trial, we review these questions for plain error. It is the defendant's burden to establish plain error. *United States v. Olano,* 507 U.S. 725, 734-735, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). To do so, he must prove that: (1) the court erred; (2) the error was obvious under the law at the time of review; and (3) the error affected substantial rights—the outcome of the proceeding. *Johnson v. United States,* 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). If all three elements are established, the court may, but need not, exercise its discretion to award relief if the error affects the fairness, integrity or public perception of the proceedings. *Id.*

believed that Burnette, the person he attempted to corruptly persuade, might communicate with a *federal* official. We conclude that proving a violation of 18 U.S.C. § 1512(b)(3) does not depend on the existence or imminency of a federal investigation but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime by officials who happen to be federal. Because of Guadalupe's position and experience in prison administration, he knew or should have known that the beating of Dante Hunter constituted a violation of federal civil rights statutes. Accordingly, we will affirm.

I.

Guadalupe was the former Deputy Warden of Operations at Curran Fromhold Correctional Facility ("CFCF"), a prison in Philadelphia. On March 11, 1999, Hunter, a prison inmate, was savagely beaten by Steptoe and Tyler, both former correctional officers. Linda Burnette, a former correctional lieutenant, testified that she observed Tyler and Steptoe punch and beat Hunter and said that she ordered them to stop but they would not do so. Burnette's testimony was corroborated by several other witnesses at trial.

Shortly after the beatings, Burnette told Captain Winston Boston, the shift commander, what had happened. After leaving Boston, she went to see Guadalupe and told him as well. She testified that Guadalupe responded that somebody was going to "burn" for what happened. After Burnette identified the officers who had beaten Hunter, Guadalupe told her: "they can't burn . . . they're my boys, my homies."

Later, when Burnette, Boston and Guadalupe were discussing the incident, Guadalupe said that he had informed the officers involved in the beating that "someone had to come up with an injury to justify the amount of force" used on Hunter. Guadalupe also told Burnette that, in her memorandum on the beating, she should not mention that she had ordered the officers to stop.

Because she felt intimidated and was afraid to "go against the grain," Burnette lied in the written statement she gave to Boston and the first two statements she gave to Internal Affairs. On March 21, 1999, Burnette told Warden Dunleavy that she had lied. Two days later she gave a full truthful statement to Internal Affairs.

II.

18 U.S.C. § 1512(b)(3) makes it a federal offense to "knowingly . . . corruptly persuade another person or attempt[] to do so . . . with intent to hinder, delay, or prevent the communication to a law enforcement officer . . . of the United States . . . of information relating to the commission or possible commission of a Federal offense. . . ." The statute further provides that "an official proceeding need not be pending or about to be instituted at the time of the offense. . . ." § 1512(e)(1). "No state of mind need be proved with respect to the circumstance ... that the official proceeding is before a judge or court of the United States . . . ," § 1512(f)(1), and "that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for . . . the Federal Government . . . ," § 1512(f)(2).

Appendix A

To obtain a conviction pursuant to 18 U.S.C. § 1512(b)(3), the government must prove that: (1) the defendant attempted to corruptly persuade a person; (2) the defendant was motivated by a desire to prevent the communication between that person and law enforcement authorities concerning the commission or possible commission of an offense; (3) the offense was actually a federal offense; and (4) the defendant believed that the person he attempted to corruptly persuade might communicate with federal authorities. *United States v. Stansfield,* 101 F.3d 909, 918 (3d Cir.1996). This last element may be inferred from the fact that the offense was federal in nature, plus "additional appropriate evidence." *Id.* An example of this "additional appropriate evidence" is that the defendant had actual knowledge of the federal nature of the offense. *Id.*

From a policy standpoint, "this framework is an appropriate reconciliation between the constraint that the government must prove the defendant's specific intent to hinder a *federal* investigation and the fact that, by virtue of § 1512(f), it need not prove that the defendant knew the federal status of any particular law enforcement officer involved in an investigation." *Id.* at 919.

The cumulative experience of this Court's judges give us specific direction on how to analyze a charge under § 1512(b)(3). In *Stansfield,* we upheld a defendant's conviction for tampering with a witness because there was "additional appropriate evidence" that the defendant believed that the witness might communicate with federal authorities. *Id.* The defendant had knowledge of the witness's past cooperation with federal authorities and was aware that an

investigation, though not necessarily a federal one, was underway. *Id.*

In *United States v. Bell,* 113 F.3d 1345 (3d Cir.1997), we applied the precise teachings of *Stansfield* to a similar set of facts. A witness was an informant for a task force comprised of local, state and federal investigators and was scheduled to testify at a state drug trial for the defendant's boyfriend. *Id.* at 1347. The defendant was also implicated in many of these drug offenses. Before the boyfriend's trial, the defendant kidnapped and murdered the witness. *Id.* This Court discussed *Stansfield* and reiterated that the government "must prove that at least one of the law enforcement-officer communications which the defendant sought to prevent would have been with a federal officer, but [] the government is not obligated to prove that the defendant knew or intended anything with respect to this federal involvement." *Id.* at 1349. In applying these principles to the facts in *Bell,* we reasoned that

> while the evidence may lend itself more obviously to the theory that Bell killed Proctor in order to prevent her from testifying a few hours later at Tyler's trial, it also supports the inference that Bell believed Proctor was going to continue to communicate with the Task Force concerning drug crimes that Bell and others had committed.

Id. at 1350.

United States v. Applewhaite, 195 F.3d 679 (3d Cir.1999), added a new dimension to our jurisprudence. There, the

defendant was involved with a woman who was separated from her husband. The defendant and the wife kidnapped the husband and attempted to murder him. *Id.* at 683. After the attack, the wife talked to a local police officer and asked him to provide an alibi for her. Following her arrest, her lover reminded the police officer to cover for her. *Id.*

The defendants were convicted of tampering with a witness in violation of 18 U.S.C. § 1512(b)(3). *Id.* at 686. On appeal, they contended that "the evidence was not sufficient to allow the jury to infer that [the local police officer] would provide a false alibi to a federal law enforcement officer." *Id.*

In analyzing the federal tampering conviction, we concluded that

> the evidence showed that the defendants attempted to influence the testimony available to law enforcement officers. The government did not have to establish that the defendants specifically intended to interfere with a federal investigation. All that § 1512(b)(3) requires is that the government establish that the defendants had the intent to influence an investigation that happened to be federal.

Id. at 687.

The teachings of *Applewhaite* lessened the government's burden of proof in federal obstruction of justice cases because we did not require any "additional appropriate evidence" that the defendant believed the person he attempted to corruptly persuade might communicate with federal officials.

Applewhaite is in line with the United States Court of Appeals for the Eleventh Circuit's decision in *United States v. Veal*, 153 F.3d 1233, 1250 (11th Cir.1998) (holding that 18 U.S.C. § 1512(b)(3) "does not depend on the existence or imminency of a federal case or investigation but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime"). The court in *Veal* reasoned:

> For violation of § 1512(b)(3), it is sufficient if the misleading information is *likely* to be transferred to a federal agent. All that was required for Veal, Watson and Haynes's violation of § 1512(b)(3) was the *possibility* or *likelihood* that their false and misleading information would be transferred to federal authorities irrespective of the governmental authority represented by the initial investigators.

Id. at 1251-1252 (emphasis in original).

The United States Court of Appeals for the Fifth Circuit in *United States v. Causey*, 185 F.3d 407 (5th Cir.1999), flatly rejected the *Veal* decision stating: "We do not find the Eleventh Circuit's reasoning persuasive in resolving the question before us in this case." *Id.* at 422. The court reversed a defendant's conviction pursuant to 18 U.S.C. § 1512(a)(1)(c) because there was no evidence that the murder was motivated by a desire to impact a future federal investigation. *Id.* at 422-423. Significantly, the court made favorable reference to our 1997 *Bell* case, but did not have

the advantage of the teachings of *Applewhaite,* decided subsequent to *Causey.*

Here, the government met its burden of proof as most recently articulated in *Applewhaite* because Guadalupe intended to influence an investigation which later became federal. We also stay faithful to the teachings of *Stansfield* and *Bell* because there is "additional appropriate evidence" that Guadalupe knew or should have known that Burnette might communicate with federal officials based on his position and experience as a prison administrator.

III.

Guadalupe was convicted under § 1512(b)(3) for "corruptly persuading" Burnette not to report that Steptoe and Tyler beat Hunter. It is undisputed that: (1) Guadalupe attempted to corruptly persuade Burnette; (2) he was motivated by a desire to prevent Burnette from communicating with officials concerning the beating of Hunter; and (3) the beating of Hunter was actually a federal offense. The only disputed issue is whether Guadalupe believed that Burnette might communicate with *federal* authorities. *See Stansfield,* 101 F.3d at 918.

Guadalupe argues that the evidence demonstrates that he intended solely to influence a non-federal investigation because he specifically instructed Burnette to make misstatements on an internal prison memoranda and during an interview with Internal Affairs. We conclude that the evidence also supports an inference that Guadalupe believed that Burnette might communicate with federal authorities.

At the time of Hunter's beating, Guadalupe had approximately seventeen years experience as a prison administrator, was second in command of CFCF along with two other deputy wardens and was responsible for the investigation of cases where correctional officers physically abused inmates. Because of his position and experience, Guadalupe had knowledge, or should have had knowledge, that the beating of an inmate in a penal institution may be considered a federal civil rights violation. There are a multitude of cases in which prison administrators have been prosecuted under 18 U.S.C. §§ 241 and 242 and it can be inferred that an administrator at Guadalupe's level would be aware of this body of case law. *See e.g., United States v. Tines,* 70 F.3d 891, 893 (6th Cir.1995) (holding that evidence was sufficient to support a prison guard's conviction under § 242 when the guard gathered other prison officers for the purpose of beating the inmates, gave the other officers stun guns and was also seen in the control room during beatings); *United States v. Vaden,* 912 F.2d 780, 781 (5th Cir.1990) (upholding a prison guard's conviction for violating the rights of an inmate under § 242 and aiding and abetting assaults on the inmate); *United States v. Bigham,* 812 F.2d 943, 944 (5th Cir.1987) (analyzing prison officials' convictions under §§ 241 and 242 for violating the civil rights of two inmates); *United States v. Jackson,* 235 F.2d 925, 928 (8th Cir.1956) (holding that a state prison guard who beat a prisoner violated § 242).[2]

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2. Since the events of March, 1999, additional cases have joined the parade of those exposing the criminal culpability of correction officers. *See United States v. Garcia,* 114 Fed.Appx. 292, 294 (9th Cir.2004) (affirming former prison guards' conviction under § 241 (Cont'd)

Moreover, we are compelled to conclude that someone in Guadalupe's position would also be conversant with the large body of cases adjudicating civil complaints by prison inmates against corrections officials under 42 U.S.C. § 1983. There are approximately fourteen pages of cases that annotate § 1983 involving "Assault by prison officials." *See* 42 U.S.C.A. § 1983 note 2191.

We hold that it was reasonable for the jury to infer that Guadalupe attempted to corruptly persuade Burnette "with intent to . . . prevent the communication by [Burnette] to a law enforcement officer . . . of the United States of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. § 1512(b)(3). Although the government did not prove that Guadalupe had actual knowledge of the federal nature of the offense or that Burnette's information might ultimately be communicated to officers who happen to be federal, this knowledge can be inferred by virtue of Guadalupe's position as a veteran top executive of CFCF with extensive knowledge of how investigations of the sort involved here proceed (including that federal authorities typically become involved).[3]

(Cont'd)
for conspiracy to violate prisoners' constitutional rights); *United States v. Velazquez*, 246 F.3d 204, 207 (2d Cir.2001) (discussing the conviction of two prison guards pursuant to §§ 241 and 242 for beating a prisoner to death).

3. This actually is more than *Bell* requires, as here Guadalupe knew or should have known from his unique perspective that federal officers were highly likely to be involved at some point in the (Cont'd)

Accordingly, there is sufficient evidence to uphold Guadalupe's conviction pursuant to 18 U.S.C. § 1512(b)(3).

IV.

In the case of an erroneous jury instruction, the relevant inquiry is whether, in light of the evidence presented at trial, the failure to instruct had a prejudicial effect on the jury's deliberations so as to produce a miscarriage of justice. *United States v. Haywood,* 363 F.3d 200, 207 (3d Cir.2004) (holding that the district court's failure to instruct the jury that knowledge of an obliterated serial number was an element of the crime of possession of a firearm with obliterated serial number was plain error). In *United States v. Farrell,* 126 F.3d 484 (3d Cir.1997), we stated that "[w]ithout any definitional assistance, we find the phrase 'corruptly persuades' to be ambiguous." *Id.* at 487. We reversed the defendant's conviction because we concluded that the conduct for which he was convicted did not constitute "corrupt persuasion" within the meaning of the statute. *Id.* at 486.

Here, Guadalupe argues that the district court improperly instructed the jury with respect to the elements of 18 U.S.C. § 1512(b)(3) because it did not define "corruptly persuades" and because it improperly explained the extent to which federal involvement must be present. First, even if the court erred by not defining "corruptly persuades," there is no

(Cont'd)
investigation whereas *Bell* merely requires that Guadalupe know that he was causing the withholding of information to officials who are in fact federal regardless of whether Guadalupe actually knew they were federal officials. *See Bell,* 113 F.3d at 1350.

evidence that this error had a prejudicial affect on the jury's deliberations so as to produce a miscarriage of justice. Unlike *Farrell,* Guadalupe does not contend that there is insufficient evidence that his conduct constituted corrupt persuasion within the meaning of the statute. The evidence is sufficient that Guadalupe instructed Burnette to lie to cover up the incident. Accordingly, there was no miscarriage of justice.

Second, we detect no error with the instructions regarding the federal element of the crime. The court's instructions comport with the instructions approved by this Court in *Stansfield. See* 171 F.3d at 816 n. 8 (instructing the jury, in relevant part, that "there need not be an ongoing federal investigation or even any intent on the part of federal authorities to investigate"). Accordingly, there was no plain error.

* * * * * *

After *Applewhaite,* the government may meet its burden of proof under 18 U.S.C. § 1512(b)(3) by proving that the defendant had the intent to influence an investigation that later turned out to be federal. 195 F.3d at 687. Under *Stansfield,* the government must present "additional appropriate evidence" of a federal nexus. *See Bell,* 113 F.3d at 1349. Here, the government has met the test articulated in *Applewhaite* as well as the more stringent test articulated previously in *Stansfield.* By attempting to corruptly persuade Burnette, Guadalupe intended to influence an investigation that later turned out to be federal. There is also "additional appropriate evidence" that Guadalupe knew or should have known that Burnette might communicate with federal

officials based on his knowledge of the federal nature of the crime imputed to him because of his position and experience as a prison administrator. Accordingly, the jury's verdict is supported by legally sufficient evidence.

Additionally, there was no plain error in the district judge's instructions to the jury.

The judgment of the district court will be affirmed.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 31, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3358

UNITED STATES OF AMERICA

v.

GLENN GUADALUPE

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 01-cr-00429-1)
District Judge: The Honorable William H. Yohn, Jr.

Argued: February 15, 2005

Before: SLOVITER, AMBRO and ALDISERT,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on February 15, 2005.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the district court entered June 19, 2003 be and the same is hereby affirmed.

Attest:

s/ Marcia M. Waldron
Clerk

DATED: March 31, 2005

APPENDIX C — JUDGMENT IN A CRIMINAL CASE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED AUGUST 8, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Case Number: 01-429-1

Jack McMahon, Esq.
Defendant's Attorney

By s/ [illegible]
Cierk

UNITED STATES OF AMERICA

V.

Glenn Guadalupe

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:

* * *

☒ was found guilty on count(s) *3 of the indictment*

Appendix C

Title & Section *18:1512(b)(3)*

Name of Offense *Obstruction*

Date Offense Concluded *3/11/99*

Count Number(s) *3*

The defendant is sentenced as provided in pages 2 through *8* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found guilty on count(s) *4 of the indictment*

* * *

Defendant's Soc. Sec. No.: *181-54-3996*

Defendant's Date of Birth: *11/29/61*

Defendant's USM No. *55589-066*

Defendant's Residence Address:
707 Stelwood Rd
Phila, PA 19115

Defendant's Mailing Address:
Same as above

8/7/03
Date of Imposition of Judgment

Appendix C

s/ [illegible]
signature of Judicial Officer

Hon. William H. Yon, Jr.
Name and title of Judicial Officer

8/8/03
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total term of *15 months*
15 months on count 3 of the indictment
☒

The court makes the following recommendations to the Bureau of Prisons:

* * *

☒

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☒

before 2 p.m. on *9/17/03*

* * *

RETURN

* * *

Appendix C

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a *2 years 2 years on count 3 of the indictment*

* * *

The defendant shall not illegally possess a controlled substance.
For offenses committed on or after September 13, 1994:

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

* * *

STANDARD CONDITIONS OF SUPERVISION

* * *

ADDITIONAL SUPERVISED RELEASE TERMS

* * *

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Appendix C

	Assessment	Fine	Restitution
TOTALS	$100.00	$300.00	$

* * *

SCHEDULE OF PAYMENTS

☒ Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒Lump sum payment of *$100.00* due immediately, balance due

☒in accordance with ☒D

* * *

D ☒Payment in *monthly* (e.g., equal, weekly, monthly, quarterly) installments of *$50.00* over a period of *6 months* (e.g., months or years), to commence *60 days* (e.g., 30 or 60 days after release from imprisonment to a term of supervision; or

* * *

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 19, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3358

UNITED STATES OF AMERICA

v.

GLEN GUADALUPE

Appellant

ORDER SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN and ALDISERT,* *Circuit Judges*

The petition for rehearing filed by Appellant, Glen Guadalupe, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

---

* Ruggero J. Aldisert, Senior Circuit Judge, as to panel rehearing only.

circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, it is ordered that the petition for rehearing be and is hereby denied.

By the Court,
/s/ Ruggero J. Aldisert
Circuit Judge

Dated: July 19, 2005

(2)

No. 05-817

In the Supreme Court of the United States

GLEN GUADALUPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner was convicted of corruptly persuading another person, or attempting to do so, with the intent to hinder, delay, or prevent her communication to a federal law enforcement officer of information relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. 1512(b)(3). The questions presented are as follows:

1. Whether the government presented sufficient evidence that petitioner believed that the person he persuaded (or attempted to persuade) might communicate with federal authorities.

2. Whether the district court committed reversible plain error in instructing the jury concerning the elements of the offense.

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In the Supreme Court of the United States

No. 05-817

GLEN GUADALUPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 402 F.3d 409.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2005. A petition for rehearing was denied on July 19, 2005 (Pet. App. 21a-22a). On October 14, 2005, Justice Souter extended the time for filing a petition for a writ of certiorari to and including December 1, 2005. On November 28, 2005, Justice Souter further extended the time for filing to and including December 16, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of corruptly persuading another person, or attempting to do so, with the intent to hinder, delay, or prevent her communication to a federal law enforcement officer of information relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. 1512(b)(3). He was sentenced to 15 months of imprisonment, to be followed by two years of supervised release. Pet. App. 16a-20a. The court of appeals affirmed. *Id.* at 1a-14a.

1. On March 11, 1999, Reginald Steptoe and Cornell Tyler, two correctional officers at the Curran Fromhold Correctional Facility in Philadelphia, savagely beat Dante Hunter, a prison inmate. Linda Burnette, a correctional lieutenant, observed the beating and ordered the officers to stop, but they refused to do so. A short time later, Burnette reported the beating to Winston Boston, the shift commander, and then to petitioner, the deputy warden. When Burnette talked to petitioner, he initially told her that someone was going to "burn" for what happened. When he learned of the identities of the officers involved, however, petitioner then told her that "they can't burn" because "they're my boys, my homies." Pet. App. 3a.

When Lieutenant Burnette later discussed the incident with petitioner and Captain Boston, petitioner said that he had informed the officers involved that "someone had to come up with an injury to justify the amount of force" used against the victim. Petitioner also instructed Burnette not to mention in her memorandum

on the incident that she had ordered the officers to stop. Pet. App. 4a.

Because Lieutenant Burnette felt intimidated and was afraid to "go against the grain," she lied in her initial memorandum and in other statements about the incident. Subsequently, however, she informed the warden of the prison that she had lied, and thereafter testified truthfully. Pet. App. 4a.

2. On July 26, 2001, a federal grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with two counts of corruptly persuading other persons, or attempting to do so, with the intent to hinder, delay, or prevent their communication to a federal law enforcement officer of information relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. 1512(b)(3). The first count concerned petitioner's conduct toward Lieutenant Burnette, and the second his conduct toward Captain Boston. At the close of the evidence, the district court instructed the jury, without objection, that the government was required to prove, *inter alia*, that "the defendant attempted to corruptly persuade another person"; that "the defendant acted with the intent to prevent the communication to a [federal] law enforcement officer * * * of information relating to the commission of a federal offense"; and that "such information relates to the commission, or possible commission, of a federal offense." The trial court also instructed the jury that "[b]y its wording this statute does not depend on the existence or imminency of a federal case or investigation, but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime." The jury found petitioner guilty on the

first count, but not guilty on the second. Pet. App. 2a, 16a-20a; C.A. App. 2260, 2261; Gov't C.A. Br. 4-5.[1]

3. On appeal, petitioner contended (1) that the government had presented insufficient evidence that petitioner believed that Lieutenant Burnette might communicate with federal authorities and (2) that the district court had erred in instructing the jury on the elements of the offense. The court of appeals affirmed. Pet. App. 1a-14a.

a. With regard to petitioner's sufficiency-of-the-evidence claim, the court reasoned that, to obtain a conviction pursuant to 18 U.S.C. 1512(b)(3), the government was required to prove, *inter alia*, that the defendant believed that the person he persuaded (or attempted to persuade) might communicate with federal authorities. Pet. App. 5a. Citing its earlier decision in *United States* v. *Stansfield*, 101 F.3d 909 (3d Cir. 1996), the court explained that "[t]his * * * element may be inferred from the fact that the offense was federal in nature, plus 'additional appropriate evidence.'" Pet. App. 5a. The court added that "an example of this 'additional appropriate evidence' is that the defendant had actual knowledge of the federal nature of the offense." *Ibid.* And the court noted that, in its subsequent decision in *United States* v. *Applewhaite*, 195 F.3d 679 (3d Cir. 1999), it had held that the government need only prove that the defendant intended to influence an investigation that happened to be federal. Pet. App. 7a.

The court of appeals then concluded that the government had met its burden of proof either under the stan-

[1] Petitioner was tried together with the officers who had engaged in the beating. Those officers were both convicted of depriving another person of his civil rights, in violation of 18 U.S.C. 242. Gov't C.A. Br. 4-5.

dard of *Stansfield*, because "there is 'additional appropriate evidence' that [petitioner] knew or should have known that Burnette might communicate with federal officials based on his position and experience as a prison administrator," or under the standard of *Applewhaite*, because "[petitioner] intended to influence an investigation which later became federal." Pet. App. 9a. The court explained that "the evidence * * * supports an inference that [petitioner] believed that Burnette might communicate with federal authorities." *Ibid.* Noting that petitioner was an experienced prison administrator, the court reasoned that, "[b]ecause of his position and experience, [petitioner] had knowledge, or should have had knowledge, that the beating of an inmate in a penal institution may be considered a federal civil rights violation," *id.* at 10a, and "that federal officers were highly likely to be involved at some point in the investigation" (insofar as "federal authorities typically become involved" in investigations of similar incidents), *id.* at 11a & n.3. The court concluded that the jury could reasonably infer "that [petitioner] had actual knowledge of the federal nature of the offense or that Burnette's information might ultimately be communicated to officers who happen to be federal." *Id.* at 11a.

b. With regard to petitioner's instructional-error claim, the court of appeals first noted that, because petitioner had failed to object to the jury instructions at trial, his claim was reviewable only for plain error. Pet. App. 2a n.1. The court of appeals then rejected petitioner's contention that the district court had committed reversible plain error by failing to provide a definition for the statutory phrase "corruptly persuades." *Id.* at 12a. The court of appeals reasoned that, even assuming that the failure to define "corruptly persuades" was er-

roneous, "there is no evidence that this error had a prejudicial [e]ffect on the jury's deliberations so as to produce a miscarriage of justice." *Id.* at 12a-13a. The court noted that "[petitioner] does not contend that there is insufficient evidence that his conduct constituted corrupt persuasion within the meaning of the statute," and added that "[t]he evidence is sufficient that [petitioner] instructed Burnette to lie to cover up the incident." *Id.* at 13a.

The court of appeals also rejected petitioner's contention that the district court had erred by "improperly explain[ing] the extent to which federal involvement must be present." Pet. App. 12a. The court of appeals concluded that the district court's instructions on that issue were not erroneous because they "comport[ed] with the instructions approved by this Court in *Stansfield*." *Id.* at 13a.

ARGUMENT

Petitioner contends that the court of appeals erred by concluding that the government presented sufficient evidence that petitioner believed that the person he persuaded (or attempted to persuade) might communicate with federal authorities (Pet. 10-19) and that the district court did not commit reversible plain error in instructing the jury on the elements of the offense (Pet. 19-26). The court of appeals' decision does not conflict with any decision of this Court and implicates no conflict among the courts of appeals. Further review is therefore unwarranted.

1. As is relevant here, the provision at issue in this case, 18 U.S.C. 1512(b)(3), imposes criminal sanctions on any person who "knowingly * * * corruptly persuades another person, or attempts to do so, * * * with intent

to * * * hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." Another subsection of the same statute, 18 U.S.C. 1512(g)(2) (Supp. II 2002), provides that, in a prosecution under Section 1512(b)(3), "no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government."

Consistent with the language of those provisions, the courts of appeals have repeatedly held that, in a prosecution under Section 1512(b)(3), the government need not prove that the defendant believed that the person he persuaded *would* communicate with federal authorities (or that the defendant *knew* that a federal investigation was ongoing or that the offense at issue was federal). See, *e.g.*, *United States* v. *Byrne*, 435 F.3d 16, 25 (1st Cir. 2006); *United States* v. *Serrata*, 425 F.3d 886, 897-898 (10th Cir. 2005); *United States* v. *Perry*, 335 F.3d 316, 321-322 (4th Cir. 2003), cert. denied, 540 U.S. 1185 (2004); *United States* v. *Emery*, 186 F.3d 921, 925 (8th Cir. 1999), cert. denied, 528 U.S. 1130 (2000); *United States* v. *Diaz*, 176 F.3d 52, 90-91 (2d Cir.), cert. denied, 528 U.S. 875 and 957 (1999); *United States* v. *Veal*, 153 F.3d 1233, 1250 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999).

Petitioner contends (Pet. 15-16) that the court of appeals' decision conflicts with the decision in *United States* v. *Causey*, 185 F.3d 407 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000).[2] In *Causey*, the Fifth Circuit

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[2] This Court denied certiorari when a similar claim was made in the petition filed in *Perry*, *supra*. See Br. in Opp. at 5-10, *Perry* v. *United*

invalidated convictions for witness tampering under 18 U.S.C. 1512(a)(1)(C), which contains a similar intent requirement to that in 18 U.S.C. 1512(b)(3). It is by no means clear, however, that the Fifth Circuit employed a different legal standard in *Causey* than the court of appeals did in this case. At the outset, the Fifth Circuit acknowledged that "there is no requirement that the Government prove that the defendants believed the law enforcement officials to be federal." 185 F.3d at 421. Instead, the Fifth Circuit reversed the convictions at issue because it found "no evidence in the record that would support an inference" that the defendants intended to prevent the victim from "pursuing her complaint beyond the New Orleans Police Department * * * and communicating with authorities who were in fact federal officers." *Id.* at 423. In reaching that conclusion, the Fifth Circuit relied on the Third Circuit's decision in *United States* v. *Bell*, 113 F.3d 1345 (Alito, J.), cert. denied, 522 U.S. 984 (1997), which (in turn relying on that court's earlier decision in *Stansfield*) had held that the fact that a defendant believed that the person he persuaded might communicate with federal authorities "may be inferred by the jury from the fact that the offense was federal in nature, plus appropriate evidence." *Causey*, 185 F.3d at 422 (quoting *Bell*, 113 F.3d at 1349).

Like the Fifth Circuit in *Causey*, the court of appeals in this case cited the standard from its earlier decisions in *Bell* and *Stansfield*. Pet. App. 5a-6a. Unlike the Fifth Circuit, however, the court concluded that the government had satisfied that standard, on the ground that there was "additional appropriate evidence" to suggest

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States (No. 03-7262).

that the defendant believed that the person he attempted to persuade might communicate with federal authorities. *Id.* at 9a. Specifically, the court noted that petitioner was an experienced prison administrator and that, as a result, petitioner either knew or should have known both that the underlying offense was potentially a federal one and that federal officials were likely to become involved in the investigation. *Id.* at 10a-11a. On that basis, the court concluded that the jury could reasonably infer "that [petitioner] had actual knowledge of the federal nature of the offense or that Burnette's information might ultimately be communicated to officers who happen to be federal." *Id.* at 11a. To the extent that the Fifth Circuit in *Causey* applied the same "additional appropriate evidence" standard but merely reached a different result on the facts of that case, there is no circuit conflict that warrants this Court's review.[4]

Petitioner also contends (Pet. 17-19) that the court of appeals' "approach" in this case "differs" from that taken by this Court in *Arthur Andersen LLP* v. *United States*, 125 S. Ct. 2129 (2005). In *Arthur Andersen*, the Court reversed the conviction of an accounting firm for corruptly persuading persons with the intent to cause them to withhold documents from, or alter documents

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[4] The court of appeals did suggest that, in its decision in *Applewhaite*, it had articulated a less stringent test than in its earlier decision in *Stansfield*. Pet. App. 7a. The court of appeals, however, ultimately concluded that the government had made the requisite showing under either test. *Id.* at 9a. To the extent that petitioner contends that the court of appeals' decision in this case nevertheless conflicts with *Applewhaite* and *Stansfield*, see, *e.g.*, Pet. 12 (asserting that "the court's decision is in direct conflict with its earlier decisions discussing this very subject"), that contention does not justify further review, because this Court does not sit to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B). The Court held, in part, that the jury instructions in that case were flawed because the jury was not required to find any nexus between the "corrupt persuasion" at issue and a particular "official proceeding." 125 S. Ct. at 2136-2137.

This case is readily distinguishable from *Arthur Andersen*, because the provision at issue in this case, 18 U.S.C. 1512(b)(3), does not require interference with an "official proceeding." Instead, Section 1512(b)(3) prohibits a person from corruptly persuading another person with the intent to interfere with the "communication to a [federal] law enforcement officer * * * of information relating to the commission or possible commission of a federal offense." In *Arthur Andersen*, there was no question that the "official proceeding" at issue was a *federal* one: *viz.*, an investigation by the Securities and Exchange Commission. See, *e.g.*, 125 S. Ct. at 2132. *Arthur Andersen* therefore does not bear on the question of what showing is required under Section 1512(b)(3) to demonstrate that a defendant believed that the person he persuaded might communicate with federal authorities.

At least one court of appeals has considered (and rejected) the same argument concerning *Arthur Andersen* that petitioner advances here. In *Byrne*, the defendant contended that *Arthur Andersen* required the First Circuit to "reassess" its earlier decisions holding, *inter alia*, that it was sufficient under Section 1512(b)(3) to demonstrate that "the possibility existed that [the witness's] communication would eventually occur with federal officials." 435 F.3d at 23 (quoting *United States* v. *Baldyga*, 233 F.3d 674, 680 (1st Cir. 2000), cert. denied, 534 U.S. 871 (2001)). The court reasoned that, in

light of the fact that Section 1512(g)(2) "explicitly disclaims" any requirement that the defendant know that the communication at issue would be made to a federal official, "[t]here is simply nothing in *Arthur Andersen* that helps the defendant." *Id.* at 25.[1] So too here, nothing in *Arthur Andersen* conflicts with the court of appeals' holding that the government presented sufficient evidence that petitioner believed that the person he persuaded might communicate with federal authorities.

2. At trial, the district court instructed the jury, without objection, that the government was required to prove, *inter alia*, that "the defendant attempted to corruptly persuade another person," C.A. App. 2260, and further instructed the jury that "[b]y its wording this statute does not depend on the existence or imminency of a federal case or investigation, but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime," *id.* at 2261.

Petitioner renews his contention (Pet. 19) that the district court erred by "fail[ing] to provide any definition of the words 'corruptly persuade'" and by "fail[ing] to properly instruct the jury regarding petitioner's state of mind concerning the federal nexus required under the statute." Because petitioner failed to object to the jury instructions, however, his claim is reviewable only for plain error.

Under *United States* v. *Olano*, 507 U.S. 725 (1993), when a defendant forfeits his claim in the trial court, relief under the plain-error rule is unavailable unless the

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[1] In *Byrne*, the court also "express[ed] * * * doubts" as to whether "*Arthur Andersen* requires a heightened showing of a nexus in a § 1512(b)(3) prosecution[] between the intent to hinder communication and a particular law enforcement agency." 435 F.3d at 25.

defendant shows, *inter alia*, that the error affects his substantial rights and seriously affects the fairness, integrity, and public reputation of judicial proceedings. *Id.* at 734-737. The court of appeals correctly held that petitioner could not meet the *Olano* standard because he could not show prejudice (and thus an effect on his substantial rights) from the district court's failure to define "corruptly persuades" and because the district court's instructions concerning the "federal nexus" requirement were not erroneous. Pet. App. 12a-13a.

Petitioner contends (Pet. 20-26) that this Court's decision in *Arthur Andersen* suggests that the district court's instructions were invalid. That contention lacks merit. With regard to the failure to define "corruptly persuades," *Arthur Andersen* held, in part, that instructions that "diluted the meaning of 'corruptly' so that it covered innocent conduct" were invalid. 125 S. Ct. at 2136. *Arthur Andersen* did not hold that instructions that *failed* to define the phrase "corruptly persuades" were necessarily invalid—and even if it had, petitioner fails to demonstrate that he suffered prejudice from any instructional deficiency. There was ample evidence to prove that petitioner instructed Lieutenant Burnette to lie in order to cover up the beating. Pet. App. 13a. *Arthur Andersen* held that knowing corrupt persuasion requires "consciousness of wrongdoing." 125 S. Ct. at 2136. Intentionally ordering subordinates to lie in order to conceal an unjustified beating clearly reflects such consciousness.

With regard to the instructions concerning the "federal nexus" requirement, petitioner's argument fails for the same reason as his argument concerning the sufficiency of the evidence. *Arthur Andersen* held, in part, that the instructions at issue were invalid because the

jury was not required to find any nexus between the "corrupt persuasion" at issue and a particular "official proceeding," 125 S. Ct. at 2136; it did not speak to the question of what the government was required to show under Section 1512(b)(3) in order to establish that a defendant believed that the person he persuaded might communicate with *federal* authorities. In no respect, therefore, is the court of appeals' decision inconsistent with *Arthur Andersen*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2006